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**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

MBA

Mailed: October 12, 2010

Opposition No. 91193562

Deere & Company

v.

UniPat Products, Virginia,
LLC

**Before Bucher, Mermelstein and Wellington, Administrative
Trademark Judges**

By the Board:

This case now comes up for consideration of motions by Deere & Company (hereinafter, "opposer"), both filed June 9, 2010, for leave to amend its notice of opposition to add a claim that the involved application is void because it was assigned in violation of Section 10 of the Act, and for summary judgment on the proposed new claim. UniPat Products, Virginia, LLC (hereinafter, "applicant") contests the motion for summary judgment and cross-moves for summary judgment in its favor on the same claim. Applicant did not file a response to opposer's motion for leave to amend, and has instead filed an answer to opposer's amended pleading.

Background and Undisputed Facts¹

Applicant seeks registration of GEAR GATOR, in standard characters, for "ATV accessories, namely, equipment racks for ATVs."² In its original notice of opposition, opposer alleges prior use and registration³ of the mark GATOR, and variations thereof, for "a wide range of motorized off-road utility vehicles as well as numerous attachments and accessories for such vehicles," and that use of applicant's mark would be likely to cause confusion with opposer's marks. Applicant denies the salient allegations in the original notice of opposition.

Applicant claims to have acquired the involved application from Sayre Enterprises, Inc., pursuant to a July 20, 2009, "Assignment of Trademark" agreement ("Assignment"). According to the Assignment, Sayre Enterprises, Inc. assigned to applicant "its entire right, title and interest in and to the Trademark and the

¹ Opposer's motion for summary judgment includes a "Statement of Undisputed Facts," and in its response to the motion, applicant stipulates to many of the facts recited herein in this section.

² Application Serial No. 77715080, originally filed by Sayre Enterprises, Inc. on April 16, 2009, based on an intent to use the mark in commerce.

³ Registration No. 1798626 for GATOR, in typed form, for "all-terrain motorized cart weighing under six thousand pounds for use in material transport," issued October 12, 1993 [Renewed; Section 15 Affidavit acknowledged]; Registration No. 2853350 for PRO GATOR, in typed form, for "heavy duty utility vehicles for commercial and industrial use," issued June 15, 2004 [Section 8 Affidavit accepted; Section 15 Affidavit acknowledged]; and Registration No. 3466044 for RGATOR, in standard characters, for "All-terrain vehicles," issued July 15, 2008.

[involved] application for registration thereof, together with the goodwill of the business symbolized by the Trademark and past common law causes of action." One of the "Whereas" clauses of the Assignment indicates that applicant "is the successor to the business of Assignor [Sayre Enterprises] in selling goods under the Trademark."

R. Scott Sayre is President of both Sayre Enterprises, Inc. and applicant, and he formed applicant on April 17, 2009, (the day after Sayre Enterprises, Inc. filed the involved application), "to manufacture and sell GEAR GATOR products." Mr. Sayre executed the Assignment on both parties' behalf.

On June 4, 2010, applicant served responses to opposer's interrogatories, including:

Interrogatory No. 32: Describe in detail each and every piece of physical equipment, business plan, know-how and other asset acquired by Applicant from Sayre Enterprises, Inc. prior to July 21, 2009, as part of the succession referenced in the ASSIGNMENT OF TRADEMARK recorded in the U.S. Patent and Trademark Office on August 20, 2009, at Reel/Frame: 4049/0562.

Response: The only asset acquired by Applicant from Sayre Enterprises, Inc. as part of the succession was the trademark application that is the subject of this opposition proceeding.

Motion for Leave to Amend

Applicant did not respond to opposer's motion for leave to amend, which is accordingly granted as conceded.

Trademark Rule 2.127(a). Opposer's proposed amended notice of opposition is now its operative pleading.

In its amended pleading, opposer maintains its claim of priority and likelihood of confusion, and adds a claim that the involved application is void under Section 10 of the Act because "[t]he only asset that [applicant] acquired from Sayre Enterprises, Inc. was the GEAR GATOR application" and applicant "is not the successor to Sayre Enterprises' business or any portion thereof." On July 8, 2010, applicant filed an answer to the amended notice of opposition, denying the salient allegations therein.

Motion for Summary Judgment

Opposer seeks summary judgment on its Section 10 claim only. Opposer argues that although the Assignment "recites that [applicant] Unipat is the 'successor' to Sayre Enterprises' business," applicant admits, in response to Interrogatory No. 32, "that nothing other than the trademark application itself was transferred." Therefore, according to opposer, the Assignment "violates Section 10 of the Trademark Act" and the involved application is "void."

In response, applicant argues, based on an amended response to Interrogatory No. 32 and the declaration of Mr. Sayre ("Sayre Dec."), that it is "the successor to the portion of Sayre's ongoing and existing business pertaining

to the GEAR GATOR mark." Specifically, Mr. Sayre testifies that

- After meeting the "inventor of the original GEAR GATOR overhead equipment rack" in December 2008, he wanted Sayre Enterprises to sell the GEAR GATOR product "and began taking steps to make that happen;" Sayre Dec. ¶ 3;
- Sayre Enterprises began creating promotional materials for the GEAR GATOR product in December 2008, created product packaging in January 2009 and "demonstrated" the product at a January 2009 trade show; Id. ¶ 4-6 and Ex. 1-2;
- Sayre Enterprises retained a company to design a website in March 2009, "including a web page on which to sell the GEAR GATOR products"; Id. ¶ 7 and Ex. 3;
- On April 16, 2009, Sayre Enterprises filed the subject application; Id. ¶ 16;
- Mr. Sayre formed applicant UniPat Products on April 17, 2009: "having decided to sell the GEAR GATOR products under a separate business ... I began transferring the part of Sayre's business associated with the GEAR GATOR mark to" applicant; Id. ¶ 9;
- On April 21, 2009, Mr. Sayre received from Sayre Enterprises's production supervisor a GEAR GATOR user instruction manual, the cover page of which prominently features applicant's trade name and the GEAR GATOR mark, and on the same day applicant purchased the domain name "thegeargator.com;" Id. ¶ 10 and Ex. 6;

- “[A]round the end of April 2009, Sayre began transferring its business plans, technical drawings, box designs, artwork, and expertise associated with the GEAR GATOR mark” to applicant; Id. ¶ 11;
- On May 6, 2009, Mr. Sayre received from one of Sayre Enterprise’s employees flyers and packaging for the GEAR GATOR product which displayed both the GEAR GATOR mark and applicant’s name; Id. ¶ 12-13 and Ex. 7 and 8;
- Applicant displayed the GEAR GATOR product at a trade show on July 12, 2009, and the “first GEAR GATOR product was sold at the trade show”; Id. ¶ 14; and
- On July 20, 2009, the Assignment was executed, transferring the mark, the subject application, and “the entire portion of Sayre’s business pertaining to the GEAR GATOR mark ... to [applicant]”; Id. ¶ 16.

Applicant’s amended response to Interrogatory No. 32 is:

“Applicant acquired the trademark application that is the subject of this opposition proceeding, graphic art, box art, marketing materials, technical drawings, an instruction manual, and product expertise/know-how.” In its response to another interrogatory, applicant claims that prior to July 21, 2009, it sold two ATV racks and one “obsolete model” cargo basket under the GEAR GATOR mark. Applicant cross-moves for summary judgment in its favor on the claim that the Assignment violated Section 10.

In its reply brief, opposer argues that both Mr. Sayre's declaration and the amended interrogatory response should be "disregarded" because they contradict applicant's "prior sworn testimony," i.e., applicant's original response to Interrogatory No. 32. Opposer points out that applicant has not explained the contradiction, other than stating in its response brief that it learned of the newly-alleged facts "after conducting further discovery." Moreover, opposer argues that applicant "has always possessed the information regarding its relationship with Sayre Enterprises and the assets it acquired (or did not acquire)."

Summary judgment is only appropriate where there are no genuine issues of material fact in dispute, thus allowing the case to be resolved as a matter of law. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. See, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Sweats Fashions, Inc. v. Pannill Knitting Co. Inc., 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. See, Opryland USA Inc. v. Great American Music Show Inc., 970 F.2d 847, 23 USPQ2d 1471, 1472

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(Fed. Cir. 1992); Olde Tyme Foods, Inc. v. Roundy's, Inc., 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

The evidence on summary judgment must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor.

Lloyd's Food Products, Inc. v. Eli's, Inc., 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); Opryland USA, 23 USPQ2d at 1472. The Board may not resolve issues of material fact; it may only ascertain whether issues of material fact exist. See, Lloyd's Food Products, 25 USPQ2d at 2029; Olde Tyme Foods, 22 USPQ2d at 1542.

As opposer points out, applicant relies entirely on the Sayre Declaration and amended interrogatory response, both of which appear to contradict applicant's original interrogatory response. Our primary reviewing Court has held that a tribunal may disregard an affidavit or declaration submitted in opposition to a motion for summary judgment when the declaration or affidavit "is directly contradicted by deposition testimony." Delaware Valley Floral Group, Inc. v. Shaw Rose Nets, LLC, 597 F.3d 1374, 94 USPQ2d 1064, 1070 (Fed. Cir. 2010) (emphasis supplied) (quoting McCormick v. City of Fort Lauderdale, 333 F.3d 1234 (11th Cir. 2003)); Gemmy Industries Corp. v. Chrisha Creations Ltd., 452 F.3d 1353, 79 USPQ2d 1172 (Fed. Cir. 2006); Sinskey v. Pharmacia Ophthalmics Inc., 982 F.2d 494,

25 USPQ2d 1290, 1293 (Fed. Cir. 1992) ("A party cannot create an issue of fact by supplying an affidavit contradicting his prior deposition testimony, without explaining the contradiction or attempting to resolve the disparity."). However, none of these cases, or any of those upon which opposer relies, hold that a party may not rely on a declaration which contradicts a prior inconsistent interrogatory response. Applicant's explanation for the discrepancy leaves much to be desired and raises additional questions. However, it is neither surprising nor unprecedented for a party to "discover" upon further investigation additional facts which might contradict a prior interrogatory response. And when incorrect or incomplete prior discovery responses are seasonably supplemented or amended, they generally have the same effect as the original discovery responses. Opposer does not specifically dispute Mr. Sayre's testimony, relying instead only on the original interrogatory response.⁴ For all of these reasons, we have considered Mr. Sayre's Declaration and the amended interrogatory response.⁵

Considering the declaration, the original and amended interrogatory responses, and the entire record herein, we

⁴ Mr. Sayre's declaration is supported by contemporaneous e-mails and documents not addressed in the original interrogatory response.

find that there are genuine issues of material fact remaining for trial. At a minimum, genuine issues of material fact exist as to whether an ongoing and existing business existed at the time of the Assignment and was transferred to a successor of Sayre Enterprises, Inc. Accordingly, the parties' cross-motions for summary judgment are hereby **DENIED**.

Conclusion

Opposer's motion for leave to amend is granted and the parties' cross-motions for summary judgment are denied. Proceedings herein are resumed, and discovery, disclosure, trial and other dates are reset as follows:

Expert Disclosures Due	January 10, 2011
Discovery Closes	February 9, 2011
Plaintiff's Pretrial Disclosures	March 26, 2011
Plaintiff's 30-day Trial Period Ends	May 10, 2011
Defendant's Pretrial Disclosures	May 25, 2011
Defendant's 30-day Trial Period Ends	July 9, 2011
Plaintiff's Rebuttal Disclosures	July 24, 2011
Plaintiff's 15-day Rebuttal Period Ends	August 23, 2011

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits,

⁵ We do not agree with opposer's assertion that Mr. Sayre's testimony necessarily contradicts the claims made in the involved

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must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

application.